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Via Electronic Mail (martin.thomas@epa.gov)

January 20, 2009

Thomas J. Martin
Assistant Regional Counsel
USEPA REGION 5
C-14J
77 West Jackson Boulevard
Chicago, IL 60604-3507

**Re: Waukegan Harbor Remedial Alternative - Public
Comment by City of Waukegan**

Dear Mr. Martin:

It is far from clear, as your January 15 reply to our January 2 email (both emails enclosed as **Attachment 1**) suggests, that the only source of a CERCLA §107(l) lien being filed against OMC Plant 2 parcel(s) would be response costs incurred at Plant 2. Please refer to Section 107(l) of CERCLA, 42 U.S.C.A. §9607(l), and paragraph 42(i) of the 2005 Supplemental Consent Decree in which the Agency reserves its §107(l) lien rights. USEPA has consistently taken the position that a §107(l) lien applies to all future costs incurred at a site. Please refer to "Use of Federal Superfund Liens to Secure Response Costs", May 28, 2002, Office of Site Remediation Enforcement (p. 2) ("The lien applies to all future costs incurred at the site") (Emphasis Added), citing "Supplemental Guidance on Federal Superfund Liens", July 29, 1993 and "Guidance on Superfund Liens", September 22, 1997. Please also refer to *U.S. v. Glidden Company*, 3 F.Supp.2d 823, 830 (N.D. Ohio), *reversed*

in part, affirmed in part, and remanded, 204 F.3d 698, 709 (6th Cir. 2000). The district court in *Glidden* rejected the owner's argument that USEPA could only apply a §107(I) lien on Parcel 1, where hazardous substances were found. USEPA argued, and the district court agreed, that the §107(I) lien applied to the entire CERCLA "site" (Parcels 1, 2 and 3). This part of the district court's decision was affirmed by the 6th Circuit.

The Outboard Marine Corporation "Site" (as listed in the National Contingency Plan, 40 CFR 300, Appendix B) consists of four operable units: Waukegan Harbor (Operable Unit #1), Waukegan Coke Plant (Operable Unit #2), PCB Containment Cells (Operable Unit #3) and OMC Plant 2 (Operable Unit #4). Please refer, for example, to the 3rd Five Year Review of the Outboard Marine Corporation Site, dated September 26, 2007. See also National Contingency Plan, 40 CFR 300.5 (definitions of "on-site" and "operable unit").

OMC Plant 2 and the submerged lands in the harbor are part of the OMC Site. According to Judge Kennelly's 11/24/08 decision, the OMC Site is comprised in part of parcels owned by Bombardier and National Gypsum (if their parcels became submerged by avulsion, which is the case). Based on the Agency's long held position that a §107(I) lien should be filed against all parcels comprising the "Site", it is not inconceivable that response costs incurred by the Agency in connection with the submerged lands in the harbor (OU #1 of the OMC Site) will result in the Agency filing a §107(I) lien against all the parcels constituting the OMC "site" (e.g., against the National Gypsum, Bombardier and OMC Plant 2 parcels). So my question remains, has USEPA thought through whether a §107(I) lien for the cost of the harbor sediments remedial action will be imposed on the parcels comprising the OMC Site? Your reference to the Agency's future exercise of "sound discretion" does not answer our question and, frankly, heightens our concern. Your suggestion that the City take comfort in the Agency's exercise of "sound discretion" also conflicts with the explicit directive in the May 22, 2002 guidance document (at Page 1): "Regional staff should seriously consider and analyze the use of liens at every site in order to protect the government's financial interest." (Emphasis Added)

USEPA represents that the proposed \$35 million dredging project will have "important redevelopment benefits" for the City of Waukegan. USEPA Fact Sheet, "EPA Proposes Cleanup Plan for Harbor Pollution" (Fact Sheet) Page 6, Second column, Third

paragraph. Repeated reference in the Fact Sheet to the Agency awaiting "funding" from the Superfund further implies that the remedy will result in no cost to the City, National Gypsum or Bombardier. Refer, for example, to the Fact Sheet, at p. 5. How does imposing a \$35 million lien on the parcels comprising the OMC Site confer "important redevelopment benefits" and not result in a cost to these parcel owners? It is obvious that costs do matter. Whether the remedy costs \$9.6 million or \$35 million has significant implications for the "redevelopment" of the lakefront. It is also obvious from your reply to our January 2, 2009 email that the former administration has either not thought through this issue or decided to misrepresent to the public the "important redevelopment benefits" of the proposed \$35 million remedial action plan.

Superfund is not a public works program. There are serious adverse consequences for persons owning any portion of a site which is the subject of a USEPA funded remedial or removal action. Experience teaches that the old adage "there ain't no such thing as a free lunch" particularly holds true for the Superfund program. The former administration should have been honest and told the public that somebody is going to have to pay the bill for the harbor cleanup. The Agency should reject the former administration's misrepresentation of the \$35 million harbor cleanup plan as a "free lunch".

Finally, subsection (k)(2)(B) of Section 113 of the Act, 42 USCA §9613(k)(2)(B), provides, "The President shall provide for the participation of interested persons, including potentially responsible parties, in the development of the administrative record on which the President will base the selection of remedial actions and on which judicial review of remedial actions will be based." [Emphasis added] It is clear from Judge Kennelly's 11/24/08 decision that LaFarge, LBM, National Gypsum and Bombardier are "potentially" liable for response costs incurred at the Site. Congress could have required the Agency to only provide notice under §9613(k)(2)(B) to "persons that have been found liable under Section 107". Instead, Congress directs the Agency to give notice to persons who may "potentially" be liable under Section 107 for response costs at a Site. Given Judge Kennelly's 11/24/08 ruling, LaFarge, LBM, National Gypsum and Bombardier clearly qualify as potentially responsible parties. Section 9613(k)(2)(B) requires the Agency to notify LaFarge, LBM, National Gypsum and Bombardier of the basis for selecting a remedial

action alternative for the harbor sediments. Did the former administration provide the required notice to these PRPs as required by §9613(k)(2)(B) of the Act? If not, when does the Agency intend to do so? It is also notable that, despite Judge Kennelly's ruling that National Gypsum and Bombardier are potentially liable under Section 107 as owners of submerged lands in the harbor, the former administration has not requested any information from the City regarding creation of the harbor by avulsion. Please refer to subsection (k)(2)(D) of Section 113 of the Act, 42 U.S.C.A. §9613(k)(2)(D) ("The President shall make reasonable efforts to identify and notify potentially responsible parties as early as possible before selection of a response action." [Emphasis Added] For reasons unclear to the City, the former administration demonstrated no interest in discharging its duty under §9613(k)(2)(D) of the Act to indentify and notify potentially responsible parties in connection with the harbor cleanup.

Please consider this additional pubic comment by the City of Waukegan on the former administration's proposed remedial alternative for Waukegan Harbor.

Very truly yours,



Jeffery D. Jeep

cc: K. Alder, USEPA Region 5 via email (adler.kevin@epa.gov)
M. Joyce, USEPA Region 5 via email (joyce.mike@epa.gov)
E. Wallace, Office of Illinois Attorney General via email (EWALLACE@atg.state.il.us)
R. Kaplan, Regional Counsel, USEPA Region 5 via email (kaplan.robert@epa.gov)
A. Tenenbaum, USDOJ via email (Alan.Tenenbaum@usdoj.gov)

JDJ/me

ATTACHMENT 1

From: Martin.Thomas@epamail.epa.gov
To: [Jeff Jeep](#);
cc: Adler.Kevin@epamail.epa.gov; Joyce.Mike@epamail.epa.gov;
[Wallace, Elizabeth](#); Kaplan.Robert@epamail.epa.gov; [Tennenbaum. Susan@epamail.epa.gov](#);
Subject: Waukegan Harbor Remedial Alternative
Date: Thursday, January 15, 2009 3:10:20 PM

Jeff, this email is to confirm that I produced for copying today the file relating to the lien for the OMC north plant, the subject of your e-mail below, per request of Derek Rieman of your staff. As you know, that lien applies to the former OMC north plant property and not the harbor. Future application of the windfall lien provision is within the sound discretion of the Agency.

Per your request, your email has been included as a public comment on EPA's proposed alternative for the harbor .

Thomas J. Martin
Associate Regional Counsel
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77 W. Jackson Blvd.
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Jeff Jeep
<jdjeep@enviroat
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	To
01/02/2009 06:58 PM	Thomas Martin/R5/USEPA/US@EPA
	cc
	Kevin Adler/R5/USEPA/US@EPA, Mike Joyce/R5/USEPA/US@EPA, "Wallace, Elizabeth"
	<EWallace@atg.state.il.us> ,
	Robert Kaplan/R5/USEPA/US@EPA,
	Susan Tennenbaum/R5/USEPA/US@EPA

Subject
Waukegan Harbor Remedial
Alternative

Tom:

I enclose a copy of your 2/23/06 letter to Mayor Hyde on the subject of a windfall lien. Will USEPA impose a windfall lien for costs incurred in connection with remedial action at the harbor? If so, on which parcels will the windfall lien be imposed? We enclose a copy of Judge Kennelly's 11/24/08 opinion and the City's Second Amended Complaint, with Exhibits A, B, C & E. Please refer to Exhibit C to the Second Amended Complaint for the identification of PIN numbers for submerged lands within the Harbor.

Will USEPA impose a windfall lien on City owned property? If so, which parcels? Will USEPA impose a windfall lien on parcels 08-22-100-056, 08-22-100-055 and 08-22-100-062 (which parcels encompass submerged lands within the harbor)?

Public comment on USEPA's proposed remedial alternative closes 2/4/09 (although the City has requested an extension until 3/4/09). Whether USEPA will seek to impose a windfall lien on City owned property is an issue of obvious concern to the City.

Please advise.

Kevin Adler and Mike Joyce:

Please consider this email as public comment on USEPA's proposed remedial alternative for Waukegan Harbor.

Regards,

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environmental law

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[attachment "060223 lien letter.PDF" deleted by Susan Prout/R5/USEPA/US]

[attachment "081124 Memorandum Opinion and Order WL.pdf" deleted by Susan Prout/R5/USEPA/US] [attachment "080513 Second Amended Complaint + select exhibits.pdf" deleted by Susan Prout/R5/USEPA/US]